91-2086

NO.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

GRANITE STATE INSURANCE COMPANY
Petitioner

v.

TANDY CORPORATION
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. In reviewing a decision by a district court to abstain from exercising clear federal jurisdiction in a declaratory judgment action, does a court of appeals determine the abstention issue de novo, or on the basis of whether the district court abused its discretion?

II. May a federal district court that clearly has jurisdiction over a declaratory judgment action in a case brought pursuant to federal law, abstain from exercising that jurisdiction in light of a later-filed action in a state court?

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Granite State Insurance Company
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Granite State Insurance Company ("Granite State"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on March 30, 1992.

OPINIONS BELOW

The order of the Court of Appeals for the Fifth Circuit denying rehearing and rehearing en banc is not reported, and is reprinted in the appendix hereto, p. A-1, *infra*.

The opinion of the Court of Appeals for the Fifth Circuit is not reported and is reprinted in the appendix hereto, p. B-1, *infra*.

The opinion of the District Court for the Southern District of Texas is reported at 762 F. Supp. 156 (S.D. Tex. 1991), and is reprinted in the appendix hereto, p. C-1, *infra*.

LIST OF PARTIES

The parties to the proceedings below are Granite State Insurance Company,[1] Tandy Corporation and TC Electronics (Korea) Ltd.

The parallel litigation subsequently filed by Tandy in Texas state court, after amendment, involves the following parties:

1. Tandy Corporation
2. Granite State Insurance Company
3. AI Marine Adjusters, Inc.
4. Insurance Company of the State of Pennsylvania
5. American International Underwriters Corporation
6. Utica Mutual Insurance Company
7. Alexander & Alexander of Texas, Inc.

JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit was rendered on March 30, 1992. A suggestion for rehearing en banc was filed on April 13, 1992, and denied on May 1, 1992. Jurisdiction over this petition is conferred by 28 U.S.C. § 1254.

This case was originally filed in the United States District Court for the Southern District of Texas. Federal maritime jurisdiction, 28 U.S.C. § 1333, and diversity jurisdiction, 28 U.S.C. § 1332, were asserted and relief was sought under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). This case was appealed to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1292(a)(3) and § 1291.

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[1] Granite State Insurance Company is wholly owned by the New Hampshire Insurance Company, which is wholly owned by NHIG Holding Corp., which is wholly owned by American International Group, Inc. Granite State has no subsidiaries.

STATUTE INVOLVED

28 U.S.C. § 2201(a). Declaratory Judgment Act.

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

This appeal arises out of a dispute between Tandy Corporation ("Tandy") and Granite State Insurance Company ("Granite State") over a $10 million claim asserted by Tandy as the assured under a Granite State marine cargo policy. Granite State filed this suit seeking a declaration that the insurance policy was void from its inception under federal maritime law, due to Tandy's material misrepresentations and nondisclosures in the procurement of the policy.[2]

On April 26, 1989, Tandy solicited a bid for worldwide marine cargo insurance[3] from Granite State. During policy negotiations, Tandy requested inclusion of an endorsement that extended coverage to inventory, work-in-progress and raw materials at Tandy's assembly plants and warehouses in

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[2] Under the maritime doctrine of *uberrimae fidei*, based on English law, both parties to a marine insurance transaction are held to the duty of utmost good faith. Misrepresentations and nondisclosures in the procurement of a policy of marine insurance will render the policy void *ab initio*. Marine Insurance Act of 1906, §§ 17 - 18 (5 EDW. 7, Ch. 41)(Eng.).

[3] Marine cargo insurance is a type of coverage that typically insures physical damage to cargo while in ocean transit, from warehouse to warehouse. This endorsement extended coverage further inland over those goods to be shipped.

Korea and other Asian countries.[4] Tandy did not tell Granite State, however, that (i) in March 1989 — less than a month before Tandy sought coverage — Tandy's Masan, Korea plant had been permanently closed and the company placed into liquidation due to labor unrest and (ii) on April 6, 1992 — just three weeks before soliciting a bid from Granite State — the striking workers had taken over the plant by force, locked out the management and seized the company's President.[5] Tandy gave Granite State no notice during bid negotiations that any property to be insured under the new policy was no longer in Tandy's care, custody and control, or was then in danger and subject to the whims of Tandy's striking labor force. To the contrary, Tandy expressly represented that "no losses" that the policy would cover had occurred.

Relying on these assertions of fact, Granite State bid on the requested coverage, and ultimately was chosen to write Tandy's marine cargo insurance. Coverage was bound effective June 22, 1989.

In January 1990, Granite State received its first notice of a loss at the Masan plant which allegedly occurred in December when Korean police stormed the warehouse to eject the strikers.[6] Within days, Granite State learned that the plant had been forcibly occupied, and that some insured property may have been damaged, before coverage was sought. Moreover, Granite State learned that Tandy had known of repeated acts of violence and the apparent theft of insured property from the Masan plant throughout 1989. Tandy had not reported those facts, as maritime insurance practice required, when the insurance was sought. By the

[4] ROA Vol. 2, pp. 144-145.

[5] See discussion ROA Vol. 3, pp. 16-18 and ROA Vol. 1, pp. 210-229.

[6] ROA Vol. 2, p. 3.

end of January 1990, Tandy told Granite State that Tandy believed the loss approached policy limits.[7]

On February 2, 1990, Granite State sent Tandy a letter reserving rights and defenses arising out of nondisclosure of material facts, possible misrepresentations, failure to give timely notice, and possible other insurance.[8] In that letter, Granite State advised Tandy that an investigation into the placement of the insurance and the amount of the loss would be required.[9] Over the next nine months, Granite State tried to get specific information from Tandy about the elements of the purported loss, but without success.[10] Despite its good-faith efforts, Granite State was unable either to evaluate its coverage or the extent of Tandy's damages.

Rather than decline coverage and risk a typical state court punitive damage claim, Granite State filed this action, as is common practice,[11] seeking a declaration of its rights under Tandy's policy.[12] Specifically, Granite State asserts that (i) Tandy failed to disclose facts material to the coverage, *i.e.*, that some of the property to be insured was no longer in Tandy's own care, but was being held hostage by Tandy's

[7] Granite State learned that property which was damaged included property insured by another company upon which Tandy had made a similar claim for full policy limits.

[8] In negotiations, Tandy stated that it had a similar warehouse endorsement in a prior policy.

[9] ROA Vol. 2, p. 3.

[10] In November 1990, Tandy sent Granite State a one-page printed form proof of loss, seeking the full $10 million policy limits, with no supporting documentation, and refused to provide any additional information. ROA Vol. 2, pp. 43-51.

[11] *See e.g.*, cases cited in Part I, Reasons for Granting the Writ.

[12] Although the loss in question purportedly occurred on land, the policy covering the loss was a marine insurance policy, subject to construction under traditional marine insurance law. Granite State filed this suit seeking a declaration with regard to the validity of the policy *at its inception.*

striking workers; (ii) Tandy actively misrepresented certain facts, *i.e.*, that there had been no losses to the property to be insured at the time the policy became effective, and (iii) accordingly, the policy of marine insurance was void *ab initio*.[13]

Tandy's reaction, less than a month after Granite State filed this declaratory judgment action, was to file suit against Granite State in Texas state court, seeking actual damages of $10 million (the policy limit). By amendment, exemplary and punitive damages of $100 million are being sought.[14] Tandy filed a motion to dismiss or stay this declaratory action pending resolution of the state court action. The district court granted Tandy's motion and ordered this litigation stayed, pending the resolution by the state court. The district court based its decision to abstain on two principal factors, namely, the possibility of piecemeal litigation, and Granite State's "race" to the courthouse, filing suit in anticipation of Tandy's expected litigation. Appendix, p. C-8. In doing so, the district court misapplied the abstention factors this Court approved in *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

On appeal, the Court of Appeals for the Fifth Circuit reviewed the district court's decision solely for abuse of

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[13] Although only Granite State and Tandy are parties to the federal action, they are the only parties necessary for a declaration of whether or not the policy is void. Furthermore, all parties to the state court action can be joined under the Federal Rules of Civil Procedure.

[14] Also named as defendants were the various agents of both Tandy and Granite State, as well as the insurance company that insured Tandy prior to the inception date of the Granite State policy. That insurance, of course, is a different policy.

discretion, and affirmed. In doing so, the Fifth Circuit specifically rejected the analysis established under *Colorado River* and *Moses Cone*, which set out a more stringent test for federal abstention. As interpreted by the Court of Appeals, the exceptional circumstances required by this Court in all other abstention-type cases are unnecessary in decisions under the Declaratory Judgment Act. Appendix, pp. B-3 - B-4. Both in its deference to the district court's discretion and in its rejection of *Colorado River* and *Moses Cone*, the Fifth Circuit deviated from established practice in several other Circuits.

REASONS FOR GRANTING THE WRIT

I. In conflict with other Circuits, the Fifth Circuit reviewed the district court's decision to stay under a deferential abuse of discretion standard rather than *de novo*.

The Fifth Circuit, in the opinion below, has held that "the district court's handling of the declaratory judgment complaint is reviewed for abuse of discretion." Appendix, p. B-4 (citations omitted). In doing so, the Fifth Circuit is in accord with the Second Circuit in *General Reinsurance Corp.* v. *Ciba-Geigy Corp.*, 853 F.2d 78, 81 (CA2 1988). This deferential review directly conflicts with decisions of the Sixth, the Seventh, the Eighth, the Ninth, the Eleventh and the District of Columbia Circuits. *See Continental Cas. Co.* v. *Robsac Industries*, 947 F.2d 1367, 1370 (CA9 1991) (insurance dispute); *Allstate Ins. Co.* v. *Mercier*, 913 F.2d 273, 277 (CA6 1990) (insurance dispute); *Cincinnati Ins. Co.* v. *Holbrook*, 867 F.2d 1330, 1333 (CA11 1989) (insurance dispute); *International Harvester Co.* v. *Deere & Co.*, 623 F.2d 1207, 1217 (CA7 1980) (patent dispute); *Hanes Corp.* v. *Millard*, 531 F.2d 585, 591 (CADC 1976) (personal injury action). *See also GEICO* v. *Simon*, 917 F.2d 1144, 1147-49 (CA8 1990) (insurance dispute). Review by this Court is

necessary to provide consistent results among the Circuits on this matter of federal jurisdiction.

Decisions in the other Circuits highlight the importance of this issue. "Because theories of state and federal law, and expressions of federalism and comity, are so interrelated in the decision to abstain such dispositions are elevated to a level of importance dictating *de novo* appellate review." *Traughber* v. *Beauchane*, 760 F.2d 673, 676 (CA6 1985) (*Pullman* abstention). Specifically, the Sixth Circuit reviews *de novo* decisions involving the exercise of discretion under the Declaratory Judgment Act. *Mercier*, 913 F.2d at 277 (construction of a homeowners insurance policy); *see also Heitmanis* v. *Austin*, 899 F.2d 521, 527 (CA6 1990) (*Colorado River* abstention). The Ninth Circuit also reviews *de novo* the decision to exercise jurisdiction over insurance disputes under the Declaratory Judgment Act. *Continental Cas. Co.* v. *Robsac Industries, Inc.*, 947 F.2d 1367, 1370 (CA9 1991). *See also American Int'l Underwriters Inc.* v. *Continental Ins. Co.*, 843 F.2d 1253, 1256 (CA9 1988) (heightened standard of review in nondeclaratory judgment *Colorado River* abstention decision); *Mobil Oil Corp.* v. *City of Long Beach*, 772 F.2d 534, 540-41 (CA9 1985) (more stringent review of declaratory judgment *dismissals* than of decisions *not* to dismiss). *See also GEICO* v. *Simon*, 917 F.2d at 1147-49.

The Eleventh Circuit has specifically rejected deferential review in a declaratory judgment action, and uses its own judgment to resolve the issues. *Cincinnati Insurance*, 867 F.2d at 1333. "Although the district court has an area of discretion in deciding whether to grant or deny declaratory relief, that discretion should be exercised liberally in favor of granting such relief in order to accomplish the purposes of the Declaratory Judgment Act. The scope of appellate review of the exercise of such discretion is not under an

'arbitrary and capricious' standard but allows the appellate court to substitute its judgment for that of the trial court." 867 F.2d at 1333 (citations omitted).

The importance of this issue is not limited to the insurance context. The Seventh and the District of Columbia Circuits have reviewed declaratory judgment abstentions *de novo* in other contexts. The Seventh Circuit "does not defer to the judgment of the district court [but] must exercise its own sound discretion as to the propriety of the grant or denial of a declaratory judgment." *International Harvester*, 623 F.2d at 1217 (citations omitted) (patent violation). While there is "no absolute right to a declaratory judgment in the federal courts," in the District of Columbia Circuit, the grant or denial of declaratory relief is subject to "searching review." *Hanes*, 531 F.2d at 591.

The Sixth, the Seventh, the Eighth, the Ninth, the Eleventh and the District of Columbia Circuits review *de novo* abstention decisions in declaratory judgment cases. The deferential review accorded by the Second and the Fifth Circuits is in express conflict with the decisions of six other Circuits. The conflict between the standard applied in the Second and the Fifth Circuits, and the standard applied in the Sixth, the Seventh, the Eighth, the Ninth, the Eleventh and the District of Columbia Circuits, indicates that this problem extends beyond the particular facts of Granite State's dispute with Tandy. The breadth of the conflict, and the need to assure uniformity among the Circuits, supports the granting of the writ.

II. In conflict with decisions of other Circuits, the Fifth Circuit has expressly ignored this Court's mandate that federal courts have a virtually unflagging obligation to exercise their jurisdiction, and only exceptional circumstances justify abdication of that responsibility.

This case presents this Court with the opportunity to conclusively resolve what has become an increasingly tangled web of conflicting decisions issued by several courts of appeals on the factors appropriate for determining whether a court should abstain from exercising jurisdiction in a declaratory judgment action.

The majority of the Circuits have held that the factors articulated in *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) apply to the exercise of discretion under the Declaratory Judgment Act. *See GEICO* v. *Simon*, 917 F.2d 1144, 1147-49 (CA8 1990); *Villa Marina Yacht Sales* v. *Hatteras Yachts*, 915 F.2d 7 (CA1 1990); *Life-Link Intern., Inc.* v. *Lalla*, 902 F.2d 1493, 1495 (CA10 1990); *Heitmanis* v. *Austin*, 899 F.2d 521, 527 (CA6 1990); *American Mfrs. Mut. Ins.* v. *Edward D. Stone, Jr.*, 743 F.2d 1519, 1525 (CA11 1984); *General Reinsurance Corp.* v. *Ciba-Geigy Corp.*, 853 F.2d 78, 81 (CA2 1988). *See also University of Maryland* v. *Peat Marwick Main & Co.*, 923 F.2d 265, 271 (CA3 1991) (*Burford* abstention). By contrast, the Fifth Circuit in this case held those factors do not apply. Appendix, p. B-3. *Accord Continental Cas. Co.* v. *Robsac Industries, Inc.*, 947 F.2d 1367, 1370 (CA9 1991). This significant split between the Circuits as to the proper analysis to be applied in declaratory judgment actions suggests certiorari review is needed.

"Abdication of the obligation to decide cases can be justified under [the abstention] doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Colorado River*, 424 U.S. at 813. The Fifth Circuit has held that, in declaratory judgment cases, a district court has virtually unfettered discretion. In accord with the Ninth Circuit in *Robsac*, 947 F.2d at 1370, the Fifth Circuit has held that *Colorado River* and *Moses Cone* do not apply to declaratory judgment actions. Had this case been brought in a district court in the First, the Second, the Third, the Sixth, the Eighth, the Tenth or the Eleventh Circuits, those courts would have allowed this case to proceed. Instead, due to the Fifth Circuit's approval of the use of a scheme contrary to the decisions of its sister circuits and the Supreme Court, this case is stayed. The circuit in which a case is filed should not determine the standard applied in exercising federal jurisdiction. Certiorari is warranted to resolve this conflict extending across nine circuits, and to assure uniformity of federal decisions on this issue of federal law.

CONCLUSION

This Court should hear this case to resolve a tangled web of decisions involving the abstention doctrine as applied in the declaratory judgment context. The Fifth Circuit's decision to allow unfettered discretion to stay duly-filed federal cases in light of later-filed state actions effectively eviscerates the declaratory judgment remedy that Congress enacted for situations just like the one in this case. The importance of these issues extends well beyond the facts of this dispute, for the outcome here will affect the abstention doctrine broadly, and the continued viability of the Declaratory Judgment Act. For these reasons, the Court should exercise its discretion to grant a writ of certiorari.

Respectfully submitted,

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June 25, 1992

NO.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

GRANITE STATE INSURANCE COMPANY
Petitioner

v.

TANDY CORPORATION
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 91-2467

GRANITE STATE INSURANCE COMPANY,

Plaintiff-Appellant,

VERSUS

TANDY CORPORATION AND
T C ELECTRONICS, (KOREA) LTD,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 3/30/92, 5 Cir., 198_, ___ F.2d ___)
(MAY 6, 1992)

Before WISDOM, JONES and SMITH, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The Judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ EDITH H. JONES
United States Circuit Judge

5/1/92

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 91-2467

GRANITE STATE INSURANCE COMPANY,

Plaintiff-Appellant,

v.

TANDY CORPORATION AND T. C. ELECTRONICS, (KOREA), LTD.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (CA-H-91-213)

(March 30, 1992)

Before WISDOM, JONES, and SMITH, Circuit Judges.[1]

EDITH H. JONES, Circuit Judge:

Granite State Insurance Company (Granite State) filed this declaratory judgment action to determine, preferably, to avoid, its rights and responsibilities under its "Marine Cargo

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Policy" issued to Tandy Corporation and T.C. Electronics (Korea), Ltd. (jointly "Tandy"). Twenty-one days later, Tandy sued Granite State in a Texas state court under the policy for the $10 million policy limits. The district court stayed the federal declaratory judgment action pending the resolution of the state court action, and Granite State appealed. Finding no abuse of discretion, we affirm.

I.

Tandy operated an electronics plant at Masan, South Korea, where in the spring of 1989, Tandy began experiencing labor problems. The plant was closed beginning April 4, when members of the union staged a sit-down strike, then later rioted and occupied the plant. Tandy regained control in December.

Also in April, 1989 Tandy opened negotiations for insurance. Granite State successfully bid on a policy and bound coverage effective June 22, 1989, issuing a "Marine Open Cargo Policy" with an endorsement extending coverage to inventory in Korea.

It does not appear that Tandy notified Granite State that the property being insured under the new policy was in danger. On January 12, 1990, Granite was first informed via telefax of a loss and potential claim under the endorsement. The losses and claim originated at the South Korean plant during the period of worker occupation.

In January 1991, after investigating Tandy's claim, Granite State filed a declaratory judgment action in the U.S. District Court for the Southern District of Texas challenging Tandy's breach of the maritime doctrine of *uberrimae fidei* and its incomplete notice of loss and uncooperativeness in the investigation. Jurisdiction was alleged to lie in admiralty or diversity. Three weeks later, Tandy sued Granite State in Tarrant County, Texas, making a claim under the policy for

the policy limits and seeking treble damages for bad claims handling. On February 16, Tandy simultaneously answered Granite State's federal complaint and sought dismissal pursuant to Fed. R. Civ. P. 12(b)(7), or alternatively, a stay pending resolution of the state court action. Following briefing and argument, the federal district court decided to stay its proceedings in deference to the state court action.

II.

The first issue, raised by Tandy, is whether this court has appellate jurisdiction under 28 U.S.C. § 1292(a)(3), which confers appellate jurisdiction from certain interlocutory orders in admiralty cases. We decline to address this difficult and hotly disputed issue, because this court has jurisdiction under 28 U.S.C. § 1291 or the collateral order doctrine. The issues raised in this action will undoubtedly be litigated in the state court action for which it was stayed, and because of the stay, the federal court will be bound under principles of *res judicata* by the outcome of the state court suit. Where a stay order effectively dismisses the federal suit, as in this case, it is treated as a final order under § 1291. *See generally, Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 8-10, 103 S. Ct. 927, 934, 74 L.Ed.2d 765 (1983); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 n.2, 82 S. Ct. 1294, n.2, 8 L.Ed.2d 794 (1962). *Moses H. Cone* held alternatively that such an order is appealable, even if non-final, under the collateral order doctrine. 460 U.S. 11-13, 103 S. Ct. 934-35.

III.

The propriety of the district court's granting of the stay in this declaratory judgment action is governed by *Brillhart* v. *Excess Insurance Co. of America*, 316 U.S. 491, 62 S. Ct. 1173, 86 L.Ed. 1620 (1942), and the *Moses H.*

Cone[2]*/Colorado River*[3] factors, which set out a more stringent test for federal abstention, do not apply.[4] *Rowan Companies, Inc.* v. *Griffin*, 876 F.2d 26, 28-29 (5th Cir. 1989); *Mission Insurance Co.* v. *Puritan Fashions, Corp.*, 706 F.2d 599, 601 n.1 (5th Cir. 1983). *See also, Continental Casualty Co.* v. *Robsac Industries*, 947 F.2d 1367 (9th Cir. 1991) (holding that *Colorado River* abstention test is inapplicable where the Declaratory Judgment Act is involved). Under *Rowan* and *Mission*, the district court's handling of the declaratory judgment complaint is reviewed for abuse of discretion. *Rowan*, 876 F.2d at 29; *Mission*, 706 F.2d at 601.

According to *Brillhart*, the district court has discretion whether to decide a declaratory judgment action. *Mission Insurance*, 706 F.2d at 601 (*citing Brillhart*); *Rowan*, 876 F.2d at 28. The district court may not dismiss a request for declaratory relief "on the basis of whim or personal disinclination." *Hollis* v. *Itawamba County Loans*, 657 F.2d 746, 750 (5th Cir. 1981). *Rowan* outlined several factors

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[2] *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 103 S. Ct. 927 (1983).

[3] *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L.Ed.2d 483 (1976).

[4] There has been conflict among the cases in this circuit concerning whether the *Colorado River/Moses Cone* factors should apply to a declaratory judgment action. *See generally, Mission Insurance Co.* v. *Puritan Fashions, Corp.*, 706 F.2d 599, 601 n.1 (5th Cir. 1983) (holding that *Moses Cone/Colorado River* factors do not apply to declaratory judgment actions); *Evanston Insurance Co.* v. *Jimco, Inc.*, 844 F.2d 1185 (5th Cir. 1988) (apparently overlooking *Mission Insurance* in applying the *Moses Cone/Colorado River* factors to declaratory judgment proceedings). As this court did in *Rowan*, we must follow *Mission Insurance* because it was the first panel decision on this issue. We also note the *Rowan* court's finding that *Mission* states the better rule and is more consistent with the essence of the declaratory judgment act. *Rowan Companies, Inc.* v. *Griffin*, 876 F.2d 26, 29 n.2 (5th Cir. 1989).

pertinent to a district court's determination whether to decide a declaratory judgment suit:

> [D]eclaratory judgment relief may be denied because of a pending state court proceeding in which the matters in controversy between the parties may be litigated, because the declaratory complaint was filed in anticipation of another suit and is being used for the purpose of forum shopping, because of possible inequities in permitting the plaintiff to gain precedence in time and forum, or because of inconvenience to the parties or the witnesses.

Rowan, 876 F.2d at 28 (citations omitted). The *Rowan* list, however, is neither exhaustive, nor is it exclusive or mandatory. *Id.* at 28-29.

The district court determined that the Tarrant County proceeding provided an adequate alternative remedy for Granite State and that the state court proceeding provided a forum for the resolution of *all* disputes arising from Tandy's claim under the insurance policy.[5] *Granite State Insurance Company* v. *Tandy Corp.*, 762 F. Supp. 162, 158 (S.D. Tex. 1991). As noted by the district court, this factor militates in favor of a stay. *Id.*

The district court also found that Granite State filed this action in anticipation of an action brought by the defendants. *Id.* Tandy and Granite State engaged in lengthy negotiations over the investigation of Tandy's proof of loss,

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[5] Tandy brought two parties into the state court action which are not present in the federal forum. Tandy joined Alexander & Alexander of Texas, Inc., Tandy's outside insurance agent, and Granite State has alleged, *inter alia*, that Alexander & Alexander made misrepresentations in procuring the policy. Tandy also joined the insurance company that Tandy claims provided its similar coverage prior to Granite State. Granite State alleges that the losses at issue occurred prior to the effective date of its policy.

the insurance company did not deny coverage until it filed the declaratory action, and Tandy's state court action followed within weeks after Granite State thereby signalled its preferred denial of coverage. The district court recognized the similarity between the present action and that in *Mission Insurance Co.* v. *Puritan Fashions, Corp.*:

> In *Puritan Fashions*, the Fifth Circuit affirmed the district court's dismissal of a declaratory judgment action that was based on a pendency of a parallel proceeding in California state court. *Puritan Fashions*, 706 F.2d at 603. As in *Puritan Fashions*, the insurance company and the insured in this suit engaged in lengthy negotiations regarding an investigation of the insured's proof of loss. As in *Puritan Fashions*, the insurance company in this suit did not deny coverage until it filed a declaratory action. As in *Puritan Fashions*, because of the tenor of the parties' relations during the investigation, "there can really be no dispute that [the insurer] expected [the insured] to file suit if its claim was denied. *Puritan Fashions*, 706 F.2d at 602.

Granite State, 762 F. Supp. at 158. The district court also noted that this court has "affirmed a *dismissal* of an action for declaratory relief on this basis when the declaratory action was initiated two months after the filing of the suit in another jurisdiction." *Id.*, *citing Pacific Employer's Insurance Co.* v. *M/V Captain W.V. Cargill*, 751 F.2d 801, 804 (5th Cir.), *cert. denied*, 474 U.S. 909, 106 S. Ct. 279, 88 L.Ed.2d 244 (1985). The district court did not err in analogizing this case to *Puritan Fashions*.[6]

[6] Granite State's brief emphasizes the contention that its insurance contract was a maritime contract subject to federal law. We do not decide this question, for to do so would interject our views unduly upon the pending state action. We note, however, that it is at least arguable that the Endorsement sued upon is not maritime, or if so, is a mixed contract, in either of which cases state law would likely be applicable. Even if it is an admiralty contract, certain state law insurance principles are applicable. *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368 (1955). The characterization of the insurance Endorsement alone does not invoke the interests of uniformity for admiralty purposes that would require a federal forum. Granite State's argument therefore does not detract from the stay order.

For these reasons, we cannot say that the district court abused its discretion in granting the stay. The judgment of the district court is AFFIRMED.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GRANITE STATE INSURANCE COMPANY, *Plaintiff,*	§	
V.	§	
TANDY CORPORATION and T.C. ELECTRONICS (KOREA) LTD., *Defendants.*	§	CIVIL ACTION NO. H-91-213

ORDER

Pending before this Court is a motion to dismiss or, in the alternative, for abatement of proceedings (Document #6) filed by the defendants. The Court held a hearing on the motion in open court on April 26, 1991. After having considered the motion, the submissions of the parties, the argument of counsel, and the applicable law, the Court determines that it should stay these proceedings pending resolution of a companion state court action.

Plaintiff Granite State Insurance Company ("GSIC") filed the instant suit in this Court on January 25, 1991. GSIC seeks declaratory relief under 28 U.S.C. § 2201 (1988), requesting that this Court issue findings that GSIC is not liable under a marine open cargo policy for losses allegedly incurred by the defendants to goods and equipment in Korea. The insurance policy was issued in favor of defendant Tandy Corporation ("Tandy") in 1989 and was to cover

specified losses from June 22, 1989. In late 1989, the defendants allegedly sustained losses to equipment and inventory during riots at a Korean manufacturing facility. GSIC's Houston underwriting agent, A-I Marine Adjusters, Inc. ("A-I"), received a notice of claim from Tandy under the policy on January 12, 1990. A-I sent Tandy a reservation of rights letter to Tandy within 30 days, and A-I thereafter attempted to procure information concerning the alleged loss from Tandy and from Tandy's outside insurance agent, Alexander & Alexander of Texas, Inc. ("A&A").

During the next several months the parties attempted, not without some difficulty, to resolve the insurer's requests for information. GSIC and the defendants acknowledge that by late 1990, the parties disagreed vehemently over Tandy's adherence to A-I's requests for information. In November 1990, Tandy sent A-I a sworn statement and proof of loss. A-I indicated to Tandy that Tandy's sworn statement and proof of loss was inadequate, but A-I did not inform Tandy that it was denying coverage. Instead, following the dispute over the sworn statement and proof of loss, GSIC filed the instant suit. After learning, through the filing of this suit, that GSIC was denying coverage, Tandy filed suit in Texas state district court within a month. That suit is currently pending in the 96th Judicial District Court of Tarrant County, Texas, under the caption *Tandy Corporation* v. *Granite State Insurance Company, Utica Mutual Insurance Company and Alexander & Alexander of Texas, Inc.*, Civil Action No. 96-133298-91. In the state court action, Tandy has joined A&A: GSIC has alleged, *inter alia*, that A&A made misrepresentations in procuring the policy. Tandy has also joined in the state court suit the insurance company that Tandy claims provided it similar coverage prior to GSIC: GSIC has also alleged that the losses at issue occurred prior to the effective date of its policy.

The defendants now request that this Court decline to exercise its discretionary jurisdiction over actions for declaratory relief and dismiss or stay the instant suit. Both sides recognize that a court's exercise of jurisdiction to grant declaratory relief is discretionary rather than mandatory. *Brillhart* v. *Excess Insurance Co. of America*, 316 U.S. 491, 494 (1942); *see Commercial Metals Co.* v. *Balfour, Guthrie, & Co.*, 577 F.2d 264, 266 (5th Cir. 1978); *909 Corp.* v. *Village of Bolingbrook Police Pension Fund*, 741 F. Supp. 1290, 1292 (S.D. Tex. 1990). A primary consideration in a court's decision to exercise jurisdiction in such a case is whether due to the pendency of other proceedings, the court's exercise of jurisdiction will result in piecemeal adjudication of a dispute. *See Hollis* v. *Itawamba County Loans*, 657 F.2d 746, 750 (5th Cir. Unit A Sept. 1981); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2759, at 648 (2d ed. 1983). A court may also consider whether a declaratory complaint was filed in anticipation of the filing of a suit by a defendant in the declaratory action. *See Rowan Cos.* v. *Griffin*, 876 F.2d 26, 29 (5th Cir. 1989); *Pacific Employers Insurance Co.* v. *M/V Captain W.D. Cargill*, 751 F.2d 801, 804 (5th Cir.), *cert. denied*, 474 U.S. 909 (1985); *Amerada Petroleum Corp.* v. *Marshall*, 381 F.2d 661, 663 (5th Cir. 1967), *cert denied*, 389 U.S. 1039 (1968).

GSIC's claims regarding its liability for Tandy's claim on the insurance policy have led Tandy to bring into the state court suit two parties that are not present in this suit. If GSIC succeeds on its claim that the loss alleged by the defendants does not fall within the effective period of its policy, the defendants may need to seek recourse against their previous insurer. If GSIC succeeds on its claim that A&A made misrepresentations to A-I in obtaining the policy, the defendants may need to seek recourse against A&A. The issues as raised initially by GSIC have thus invoked

legal relationships that cannot be completely resolved in the confines of this suit. On the other hand, GSIC does not argue that it will be unable to litigate all coverage issues in the Tarrant County suit. *See Amerada Petroleum Corp.*, 381 F.2d at 663 (noting that plaintiff in the declaratory action at issue "is not in the position of one who cannot obtain an adjudication of its legal rights" in the companion proceeding). The Tarrant County proceeding's provision of an adequate alternative remedy for GSIC's claims, taken together with the potential for resolution in the state court proceeding of all disputes arising from Tandy's claim under the insurance policy, thus militates in favor of a stay of this suit. *See Mission Insurance Co.* v. *Puritan Fashions Corp.*, 706 F.2d 599, 603 (5th Cir. 1983).

For purposes of determining whether the instant suit was initiated in anticipation of an action brought by the defendants, the Court finds that the facts of this case are very similar to those in *Puritan Fashions*. In *Puritan Fashions*, the Fifth Circuit affirmed the district court's dismissal of a declaratory judgment action that was based on the pendency of a parallel proceeding in California state court. *Puritan Fashions*, 706 F.2d at 603. As in *Puritan Fashions*, the insurance company and the insured in this suit engaged in lengthy negotiations regarding an investigation of the insured's proof of loss. As in *Puritan Fashions*, the insurance company in this suit did not deny coverage until it filed the declaratory action. As in *Puritan Fashions*, because of the tenor of the parties' relations during the investigation, "there can really be no dispute that [the insurer] expected [the insured] to file suit if its claim was denied." *Puritan Fashions*, 706 F.2d at 602.

Furthermore, Tandy filed the state court action shortly after GSIC indicated its denial of coverage by filing the declaratory action. The Fifth Circuit has affirmed a *dismissal*

of an action for declaratory relief on this basis when the declaratory action was initiated two months prior to the filing of the suit in another jurisdiction. *Pacific Employers Insurance Co.*, 751 F.2d at 804. Here, Tandy initiated the state court action within a month of the filing of this suit. After having considered the circumstances of the filing of the suits, and the relations between the parties before the suits were initiated, the Court concludes that GSIC filed the instant suit in anticipation of an action that GSIC knew would be filed immediately after it gave notice to the defendants of its intent to deny coverage. *Cf. Casualty Indemnity Exchange* v. *High Croft Enterprises, Inc.*, 714 F. Supp. 1190, 1193-94 (S.D. Fla. 1989); *State Farm Fire & Casualty Co.* v. *Taylor*, 118 F.R.D. 426, 430 (M.D.N.C. 1988).

It is unclear whether in this circuit a court need also consider the abstention factors set out in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), in deciding whether to decline to exercise immediate jurisdiction over an action for declaratory relief because of the pendency of a companion state court proceeding. *See Rowan Cos.*, 876 F.2d at 29 n.2 (indicating that *Colorado River* analysis probably should not apply in cases involving requests for declaratory relief); *Sandefer Oil & Gas, Inc.* v. *Duhon*, 871 F.2d 526, 528 (5th Cir. 1989) (noting, but declining to resolve, apparent conflict between *Puritan Fashions* and *Evanston Insurance Co.* v. *Jimco, Inc.*, 844 F.2d 1185 (5th Cir. 1988)); *Puritan Fashions*, 706 F.2d at 601 n.1 (holding that because exercise of jurisdiction in declaratory actions is discretionary, such actions are not subject to *Colorado River* analysis under *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983)). In an abundance of caution, the Court will also consider the *Colorado River* factors.

As GSIC points out, "[g]enerally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.' " *Colorado River*, 424 U.S. at 817 (quoting *McClellan* v. *Carland*, 217 U.S. 268, 282 (1910)). However, "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration . . ., though exceptional, do nevertheless exist." *Colorado River*, 424 U.S. at 818.

In deciding whether to abstain from hearing a case due to the pendency of a similar state court action, a federal district court may consider the following factors: (1) the avoidance of exercises of jurisdiction over particular property by more than one court, (2) the inconvenience of the federal forum, (3) the desirability of avoiding piecemeal litigation, (4) the order in which jurisdiction was obtained by the concurrent forums, (5) the applicability of federal or state law to the merits of the claims at issue, and (6) the adequacy of the state court proceedings to protect the rights of the party that invoked the federal court's jurisdiction. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 15-16, 23 (1983); *Colorado River*, 424 U.S. at 818; *Evanston Insurance Co.* v. *Jimco, Inc.*, 844 F.2d 1185, 1190 (5th Cir. 1988); *Goerner* v. *Barnes*, 730 F. Supp. 767, 768 (S.D. Tex. 1990).

When a court considers whether to exercise *Colorado River*-type abstention, it should "take[ ] into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise." *Colorado River*, 424 U.S. at 818-19; *see Moses H. Cone*, 460 U.S. at 15-16; *Goerner*, 730 F. Supp. at 768. As applied here, at least three of the factors under *Colorado River* and *Moses H. Cone*

indicate that this Court should decline to hear the instant suit.

The second *Colorado River* factor "primarily involves the physical proximity of the federal forum to the evidence and witnesses." *Evanston Insurance Co.*, 844 F.2d at 1191. Even considered in the light most favorable to GSIC, this Court does not represent the most convenient forum for the parties. The only relation of this district to the underlying dispute lies in the local negotiations regarding the insurance policy between A&A and A-I. Those negotiations have been raised by GSIC as a grounds on which it might avoid liability, but they are not the only such grounds: for example, GSIC seeks a declaration that any losses (which occurred in Korea) were sustained outside of the policy's effective period or resulted from the defendants' "deliberate abandonment of their property in Korea." Complaint for Declaratory Judgment at 20.

Furthermore, GSIC is a New Hampshire corporation with its principal place of business in Manchester, New Hampshire. Tandy is a Delaware corporation with its principal place of business in Fort Worth, Tarrant County, Texas. Defendant T. C. Electronics (Korea) Ltd. is a Korean corporation with its principal place of business in Masan, Korea. If, as GSIC's attorneys have suggested, the instant suit represents a "case between principals," then most of the witnesses germane to this dispute are located outside of this district. Likewise, most of the documentary evidence related to this dispute would be found not within this district but at the parties' corporate offices, which are located outside this district. Because at least one of the parties and numerous documents and witnesses relevant to this dispute are located in Tarrant County, the venue of the state court action would ameliorate the overall burdens of litigation on the instant

parties. *See Colorado River*, 424 U.S. at 820 (finding significant a 300-mile distance between the state and federal courts at issue); *Goerner*, 730 F. Supp. at 769 (noting the distance between the Southern District of Texas and an Oklahoma state court); *cf. Signad, Inc.* v. *City of Sugar Land*, 753 F.2d 1338, 1340 (5th Cir.) (noting, in reversing exercise of abstention by a district court, that the federal court and state court at issue "are equidistant from . . . where the dispute arose"), *cert. denied*, 474 U.S. 822 (1985).

The Court ascertains under the third *Colorado River* factor the danger of piecemeal and inconsistent adjudication between the instant suit and the Tarrant County action. As this litigation now stands, Tandy could conceivably proceed to trial on its claims against GSIC and thus force GSIC to litigate some if not all of its claims regarding coverage. It would much better serve "wise judicial administration" to have all potential disputes resulting from Tandy's claim under the policy resolved in one suit. *See Brillhart*, 316 U.S. at 495, *cited by Colorado River*, 424 U.S. at 818; *cf. Moses H. Cone*, 460 U.S. at 20 (finding an absence of danger of piecemeal litigation because "relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement").

Because the Court has found that this action was filed in anticipation of a suit that would be brought by the defendants, application of the fourth *Colorado River* factor indicates that abstention is warranted. The Court has found that by initiating what is in this situation the first-filed suit, GSIC intended to forestall a foreseeable state court suit by the defendants. *Cf. Moses H. Cone*, 460 U.S. at 21 (finding that the party initiating the second-filed federal action had had "no reasonable opportunity" to file its suit prior to the filing of the state court suit).

The *Colorado River* Court indicated that a federal court may also consider, as part of the fourth-factor inquiry, the absence of progress in the federal court litigation. *Colorado River*, 424 U.S. at 820; *Moses H. Cone*, 460 U.S. at 21-22. The parties did not inform the Court of the status of the suit in Tarrant County, but the Court notes that the instant suit has not passed the stage of rule 12 motions. The defendants have not taken any action before this Court other than to file an answer, the instant motion, and related briefs, and GSIC has merely filed its complaint and response to the defendants' motion. *See Colorado River*, 424 U.S. at 820 (noting "the apparent absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss").

The sixth element of the *Colorado River/Moses H. Cone* inquiry "can only be a neutral factor or one that weighs against, not for, abstention." *Evanston Insurance Co.*, 844 F.2d at 1193. As set out above, the sixth factor provides no added weight in favor of this Court's retention of jurisdiction. GSIC has not shown that it would be unable to pursue the claims that it presses in this Court in the Tarrant County proceeding. *See Goerner*, 730 F. Supp. at 771.

The Court thus determines that under *Brillhart* and its progeny, a stay of these proceedings is warranted pending resolution of the companion state court action. Furthermore, based on its application of the factors enunciated in *Colorado River* and *Moses H. Cone*, the Court determines that this case presents those circumstances that warrant a stay due to the pendency of a parallel state court proceeding.

Based on the foregoing, the Court

ORDERS that this action is hereby STAYED pending resolution of *Tandy Corporation* v. *Granite State Insurance Company, Utica Mutual Insurance Company and Alexander & Alexander of Texas, Inc.*, Civil Action No. 96-133298-91,

currently pending in the 96th Judicial District Court of Tarrant County, Texas.

SIGNED at Houston, Texas, on this the 30 day of April, 1991.

/s/ DAVID HITTNER

David Hittner
United States District Judge